SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2019 0166

DOUGLAS GORDON JOHNSTON Appellant

v

DIRECTOR OF PULIC PROSECUTIONS (CTH) [No 2] Respondent

JUDGES:	MAXWELL P, BEACH and NIALL JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	On the papers
DATE OF JUDGMENT:	16 April 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 95
JUDGMENT APPEALED FROM:	[2019] VCC 825 (Judge Wilmoth)

CRIMINAL LAW – Sentence – Appeal – Obtain financial advantage by deception (9 charges) – Convictions on 3 charges quashed on appeal – Need to resentence appellant on remaining 6 charges – Appellant resentenced to TES of 3 years and 6 months, with NPP of 21 months.

REPRESENTATION:	Counsel	Solicitors
For the Appellant	Ms G Connelly	Amad Lawyers
For the Respondent	Mr J Gullaci	Ms A Pavleka, Solicitor for Public Prosecutions (Cth)

MAXWELL P
BEACH JA
NIALL JA:

1 After a trial in the County Court, the appellant was convicted of nine charges of obtaining financial advantage by deception contrary to s 82(1) of the *Crimes Act 1958*. On 7 June 2019, he was sentenced as follows:

Charge	**Offence**	**Maximum**	**Sentence**	**Cumulation**
1	Obtain financial advantage by deception on 14.1.2010	10 years	2 years	6 months
2	Obtain financial advantage by deception on 15.1.2010	10 years	2 years	6 months
3	Obtain financial advantage by deception on 18.1.2010	10 years	2 years	–
4	Obtain financial advantage by deception on 28.1.2010	10 years	2 years	–
5	Obtain financial advantage by deception on 14.7.2011	10 years	3 years	Base
6	Obtain financial advantage by deception on 11.1.2012	10 years	2 years	6 months
7	Obtain financial advantage by deception on 24.3.2012	10 years	2 years	6 months
8	Obtain financial advantage by deception on 21.5.2012	10 years	2½ years	6 months
9	Obtain financial advantage by deception on 22.5.2012	10 years	2 years	6 months
Total Effective Sentence:		6 years		
Non-Parole Period:		3 years		

2 On 10 February 2021, this Court allowed the appellant's appeal against conviction on charges 5, 8 and 9, quashed those convictions, set aside the sentences on those charges and ordered a retrial of those charges.[1]

[1] *Johnston v DPP (Cth)* [2021] VSCA 11.

3 The appellant now falls to be resentenced on the charges of which he remains convicted (charges 1–4 and 6–7).

4 The appellant submits that charges 1–4 reflect different occasions on which money was transferred from the account of one of the appellant's victims, but that the false representations relied upon to support each of those charges were made on a single occasion prior to the first transfer. The appellant submits that this Court must impose individual sentences and orders for cumulation 'that avoid double punishment for the common offending representations'. The appellant submits that this should result in lesser individual sentences and orders for cumulation than those imposed by the trial judge.

5 Additionally, the appellant submits that up-to-date medical evidence (a report dated 24 January 2021 from Dr Victoria Jackson, a consultant forensic psychiatrist) discloses that, since being sentenced, the appellant's mental health has deteriorated and that this should be taken into account in accordance with the principles in *R v Verdins*.[2]

6 In its submissions, the respondent notes that the appellant did not apply for leave to appeal against any sentence imposed by the judge. The respondent submits that each of the individual sentences, the orders for cumulation and the non-parole period imposed by the judge were appropriate in the circumstances, subject only to the need to fix a different sentence as the base sentence, and the view this Court takes of the impact of the appellant's current mental health condition on his resentencing.

7 In our view, the respondent's submission should be accepted. Specifically, the sentences imposed by the judge on charges 1–4 did not contain any element of double punishment. Notwithstanding the deterioration in the appellant's mental health since his original sentencing, we think that the sentences originally imposed on charges 1–4 and 6–7 and the orders for cumulation are appropriate in light of all

[2] (2007) 16 VR 269.

of the circumstances of the appellant's offending and the matters personal to him, including his present circumstances.

8 Accordingly, on the resentencing we would impose terms of imprisonment of two years on each of charges 1–4 and 6–7, declare the sentence on charge 1 to be the base sentence and cumulate six months of the sentences on charges 2, 6 and 7. This would make a total effective sentence of 3 years and 6 months.

9 The judge fixed a non-parole period which was 50 per cent of the total effective sentence. The lesser total effective sentence which we will impose requires us to fix a new non-parole period which is appropriate in all of the circumstances. It does not require us to engage in some exercise that seeks some mathematical equivalence with the ratio between the total effective sentence and non-parole period originally fixed by the trial judge. In all the circumstances, we think the appropriate non-parole period should now be 21 months.

10 We will make orders accordingly, including fixing the amount of pre-sentence detention already served by the appellant under this sentence.

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